

## Aberystwyth University

### *Elder Abuse: Criminological perspective*

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*Published in:*  
Handbook on Crime

*Publication date:*  
2010

*Citation for published version (APA):*

Williams, J. (2010). Elder Abuse: Criminological perspective. In F. Brookman, M. Maguire, H. Pierpoint, & T. Bennett (Eds.), *Handbook on Crime* (pp. 415-426). Willan Publishing.

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# **Handbook on Crime**

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**WILLAN  
PUBLISHING**

Published by

Willan Publishing  
Culmcott House  
Mill Street, Uffculme  
Cullompton, Devon  
EX15 3AT, UK

Tel: +44(0)1884 840337  
Fax: +44(0)1884 840251  
e-mail: [info@willanpublishing.co.uk](mailto:info@willanpublishing.co.uk)  
website: [www.willanpublishing.co.uk](http://www.willanpublishing.co.uk)

Published simultaneously in the USA and Canada by

Willan Publishing  
c/o ISBS, 920 NE 58th Ave, Suite 300  
Portland, Oregon 97213-3644, USA  
Tel: +001(0)503 287 3093  
Fax: +001(0)503 280 8832  
e-mail: [info@isbs.com](mailto:info@isbs.com)  
website: [www.isbs.com](http://www.isbs.com)

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First published 2010

ISBN 978-1-84392-371-8 paperback  
978-1-84392-372-5 hardback

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library



Mixed Sources

Product group from well-managed  
forests and other controlled sources

Cert no. COC-002-2462

[www.fsc.org](http://www.fsc.org)

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Project management by Deer Park Productions, Tavistock, Devon  
Typeset by GCS, Leighton Buzzard, Beds  
Printed and bound by T.J. International, Padstow, Cornwall

## Chapter 22

# Elder abuse

*John Williams*

### Introduction

All the indications are that we live longer and that this trend will continue. We have an ageing population and this creates challenges, not least the provision of pensions and social welfare benefits. In addition, older people will encounter crime and the criminal justice system as victims, potential victims and offenders. Criminology has paid less attention to older people than to juveniles and other groups, yet there are many issues where age or ageing is a distinct feature. Older prisoners are the fastest growing group within the prison system (HMIP 2004, 2008). The fear of crime among older people is, within some older groups, disproportionate to the reality (see, for example, Chadee and Ditton 2003; Chivite-Matthews and Maggs 2002; Zedner 2002). The impact of a criminal act against an older person may be devastating and in the extreme lead to premature death (Donaldson 2003). All of these invite more research from a criminological perspective. However, this chapter concentrates on one relatively neglected topic for criminological research, namely elder abuse. Although it is increasingly a subject that attracts research into the social welfare dimension, it is rarely considered within a criminal context.

### Definitions

Until recently there was a paucity of data on the prevalence of elder abuse in the United Kingdom, largely because of imprecise definitions (Glendenning 1997: 13–41; Moskowitz 1998: 94). This chapter will not rehearse the debate on what is meant by 'elder' or 'old', but will adopt a pragmatic age of sixty years. Definitions of elder abuse, or more typically 'vulnerable adult abuse', are many and varied. The English and the Welsh guidance on developing and implementing multi-agency policy and procedures to protect vulnerable adults from abuse, *No Secrets* and *In Safe Hands* (Department of Health 2000;

Social Services Inspectorate Wales 2000), adopts the definition proposed in the Lord Chancellor's Consultation Paper, *Who Decides?* (Lord Chancellor's Department 1997). This definition provides that a 'vulnerable person' is one

... who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.

In one sense this is a convenient definition for local authorities as it links protection policies to a client group already identified, or easily identifiable, for the purposes of community care. However, whether a person is in need of community care services under the National Health Service and Community Care Act 1990 is irrelevant as to whether they are vulnerable to abuse. It is conceivable that an older person is vulnerable but not in need of community care services and unlikely ever to be so in need. Similarly, the older person could be in need of community care services but not vulnerable. A physically and mentally fit older person, who is coerced into parting with money by an abusing relative, is in need of protection; the need for community care services is possibly non-existent and arguably irrelevant. He or she may be ineligible for community care services under the 1990 Act. Some forms of psychological abuse may be driven by the strength of the abuser's personality rather than the need of the abused person for community care services. The link with community care services reinforces the welfare approach to elder abuse and its decriminalisation by society.

The second part of the definition deals with an essential component of vulnerability, namely the inability to protect against 'significant harm or exploitation'. The inability to protect arises because of the physical or mental frailty of the individual and the relative power of the abuser in relation to the abused person. This may be because of financial dependency, care dependency or the dominant personality of the abuser.

This narrow definition in the guidance is barely fit for purpose and reinforces the belief that a predominately welfare definition is appropriate. A similar debate took place within Scotland, which eventually led to the passing of the Adult Support and Protection (Scotland) Act 2007. In rejecting a broader based definition of 'vulnerable', the Scottish Law Commission stated:

A much narrower definition of vulnerable was said to be needed, many respondents commenting that at some point in their lives almost everyone was vulnerable in the sense we used in our discussion paper. We appreciate the force of this criticism. A wide definition would place too great a strain on local authority resources and would make it impossible for the local authority to confine its attentions to those genuinely in need of them. (Scottish Law Commission 1997: para. 2.15)

The first sentence makes a reasonable point; vulnerability is something that we all experience, very often only temporarily. However, the second sentence exposes the underlying fear of government of the resource implications of

the investigation and prevention of vulnerable adult abuse. The Commission conceded that there was a need to restrict the definition in recognition of the resource implications of a more broadly based approach. This restricted definition of vulnerability is driven by the peculiarities of the funding of social care and is regrettable. The danger is that this narrow definition also dictates the response of the criminal law enforcement agencies and the criminal justice system. Cases of actual elder abuse may be excluded from the criminal justice system because they do not fall within a social welfare definition driven by a resource allocation model.

The English and Welsh guidance defines 'abuse' widely as being

... a violation of an individual's human and civil rights by any other person or persons. (para. 2.5 and para 7.4)

This is useful, albeit vague and includes stranger crime. However, English and Welsh guidance does not consider that stranger crime will feature within the procedure other than in exceptional circumstances. The guidance states:

Stranger abuse will warrant a different kind of response than the response to abuse within an ongoing relationship or care setting. Nevertheless in some instances it may be appropriate to use the locally agreed inter-agency adult protection procedures to ensure that the vulnerable adult receives the services and support that they need. Such procedures may also be used when there is the potential for harm to other vulnerable people. (para. 2.13 and para 7.17)

The definition recognises that abuse violates the rights under the European Convention on Human Rights to life, protection from inhuman and degrading treatment and to dignity as part of the right to a private life.

What the above discussion demonstrates is that the definitional debate on elder abuse focuses on welfare support almost to the exclusion of the criminal dimension. Action on Elder Abuse (1995) take a broader view and include the element of abuse of trust. They define abuse as:

A single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

Elder abuse takes many, often multiple, forms. The most obvious are physical and sexual abuse. Financial and material abuse includes theft, fraud and exploitation. These may involve transfers of property and money obtained through deception or threats of violence. Straightforward theft is also included. Psychological abuse includes emotional abuse, threats of harm or abandonment, deprivation of contact, humiliation, blaming, controlling, intimidation, coercion, harassment, verbal abuse, isolation or withdrawal from services or supportive networks. Neglect and acts of omission include ignoring medical or physical care needs, failure to provide access to appropriate health, social care or educational services, and the withholding of necessities such as



## Patterns and trends

Attitudes towards elder abuse are ambivalent. It is effectively decriminalised and regarded as a welfare issue. Elder abuse is under-reported. Typically it occurs in private space – the person's own home, a care home, a nursing home or a hospital. Brogden and Nijhar (2000) express concern about such under-reporting.

A signal failure of victim surveys is not just inadequate documentation of household abuse but also because they rarely include care and nursing home respondents, where victimisation may be rampant. (p. 63)

Lack of societal recognition of elder abuse as criminal activity emphasises its private nature, inviting at best welfare-based responses. A recent study of elder abuse by Mowlam *et al.* (2007) involving 2,100 older people (66 years or over) in England, Scotland, Wales and Northern Ireland provided data on the prevalence of elder abuse in domestic settings. It excluded older people in institutions (hospitals or care homes) and those with dementia. Their 'Prevalence Study of Elder Abuse' identified significant elder abuse within older people's own homes (4 per cent aged 66 years and over – approximately 342,000 people), often perpetrated by close family members. Partners (35 per cent), other family members (33 per cent) and neighbours/acquaintances (33 per cent) are the primary abusers, with domiciliary care workers accounting for 9 per cent and friends 3 per cent. Most abusers are men; 74 per cent for physical abuse, 56 per cent for theft and 80 per cent for other forms of abuse. A significant number of victims (30 per cent) did not report the abuse. Only 4 per cent reported the abuse to the police. Worryingly none of the victims mentioned the adult protection procedures for investigating cases of suspected abuse. The prevalence of elder abuse is highest in Wales (6 per cent) and lowest in Northern Ireland (3 per cent).

The abuser may be a relative, informal carer, friend, spouse, partner or professional. The existence of an expectation of trust, stressed in the Action on Elder Abuse definition, distinguishes the act from stranger crime. However, that relationship should not decriminalise the conduct. A crime against person or property by a spouse, partner or carer is as much a criminal offence as stranger crime. Arguably, it is an aggravated crime given that it also involves a breach of trust between abuser and abused. It is, therefore, odd that it is rarely treated as criminal. Indeed, the term 'elder abuse' suggests that it is different from a crime and should be treated differently (Williams 2008).

## Responses

Analogies with domestic violence are revealing. It is only relatively recently that society accepted that domestic violence is also a crime rather than a purely 'social', 'domestic' or 'welfare' matter (Creaney and Davis 1996). Police involvement in the investigation of elder abuse is critical. They are an integral part of the joint agency response to elder abuse under the English and Welsh

medication, adequate nutrition and heating. Within each of these categories the behaviour of the abuser will constitute 'abuse' in the sense defined in the guidance; however, it will invariably also constitute a criminal offence. For example, the Domestic Violence Crime and Victims Act 2004 introduced the offence of causing or allowing the death of a child or vulnerable adult. There are many offences against the person including murder, assault, actual bodily harm, grievous bodily harm and rape; section 58 of the Medicines Act 1968 makes it an offence to administer drugs that have been prescribed for someone else. The Sexual Offences Act 2003 introduced a range of new offences in relation to sexual conduct with a person with a mental disorder impeding choice. The Mental Capacity Act 2005 makes it a criminal offence to ill treat or wilfully neglect a person lacking capacity or reasonably believed by the perpetrator to lack capacity. Section 2 of the Protection from Harassment Act 1997 states that a 'person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him or her, is guilty of an offence'. Conduct includes verbal abuse. A range of property and finance offences exist including theft and offences of obtaining through deception.

Recognition of the criminal nature of most, if not all, acts of elder abuse is critical in ensuring that society's response does not deny older people the protection of the criminal law. Article 3 of the European Convention on Human Rights imposes a positive duty on states to protect against inhuman or degrading treatment. In *X v. Netherlands* and *A v. UK* the European Court of Human Rights emphasised that this duty applies regardless of the focus of the abuse (a private care home or a family home) and the identity of the perpetrator; it also emphasised that the duty under the article is more compelling when vulnerable people are involved. To deny an older person who is the victim of abuse an effective remedy through the criminal courts is a violation of their Convention rights.

A number of factors can be identified in seeking to establish a broader definition that is not entirely focused on the welfarist response to elder abuse. They include:

- 1 the scale and intensity of vulnerability bearing in mind that not all older people are vulnerable;
- 2 the categories of abuse – financial, sexual, physical, psychological, social; neglect; the relatively private nature of the space in which abuse is committed;
- 3 the criminal nature of most acts of abuse and the recognition that such criminal activity should not be covertly or overtly excluded from the criminal justice system;
- 4 the importance of breach of trust as an element of elder abuse that distinguishes it from stranger crime.

Of these (3) is particularly important and absent from current definitions. These components provide helpful prompts in formulating a definition appropriate for researchers and practitioners in social welfare and the criminal justice sectors.

guidance noted above. The need for the police to investigate any alleged criminal offence is emphasised in the guidance:

Accordingly, when complaints about alleged abuse suggest that a criminal offence may have been committed it is imperative that reference should be made to the police as a matter of urgency. Criminal investigation by the police takes priority over all other lines of enquiry. (para. 2.8 and para. 7.8)

Early involvement of the police is desirable as they can ensure that forensic evidence is not destroyed or contaminated. In some cases of elder abuse, where the older person has restricted or no legal capacity. Police expertise may also be helpful in investigating the allegations and interviewing victims. Early involvement may minimise the risk of repeat interviews of the victim. Police interviews can proceed alongside those geared towards health and social care issues (Department of Health 2000: para. 6.7).

One major weakness in the current arrangements is the lack of any general power of access for social workers or health care professionals to vulnerable older people whom they suspect are being abused or neglected. A warrant is obtainable under section 135 of the Mental Health Act 1983 authorising a constable to enter premises where there is reasonable cause to suspect that a person believed to be suffering from mental disorder is being ill treated, or to enter premises to retake a patient already detained under the Act. The person must be taken to a place of safety for a period not exceeding 72 hours. These provisions, although involving the police, are again welfare based and enable the person either to be assessed or returned to hospital. Furthermore, they only apply to people thought to have a mental disorder and not to all older people. Under section 18(1)(e) of the Police and Criminal Evidence Act 1984, a police officer may enter and search any premises, without a warrant, for the purpose of saving life or limb, or preventing damage to property. Section 25 of the Act enables a police officer, where there are reasonable grounds, to arrest a person to prevent them from causing physical injury to another person, or to protect a child or other vulnerable person. The availability of these powers emphasise the importance of involving the police in interdisciplinary vulnerable adult protection procedures.

Too close a comparison between child abuse and elder abuse can produce false paradigms. In an American context, Oberloh argues that you can derive a satisfactory definition from an alteration of the child abuse legislation. He states:

By simply replacing 'parent, guardian, or custodian' with 'care giver' and 'child' with 'elder', the definition would cover any abandonment, mistreatment, abuse, failure to provide necessary medical care, emotional harm, or mental injury committed against an elder by a care giver. If medical professionals can effectively diagnose and report abuse of children by following [child protection laws], there is no reason to think that requiring them to diagnose and report elder abuse will be any less effective. (Oberloh 2000: 666)

The Law Commission for England and Wales (1995) report, *Mental Incapacity*, proposed a public law to protect vulnerable adults from abuse. It was modelled largely on the Children Act 1989, including the use of 'significant harm' as a key concept. The government rejected the report, arguing that the proposals would interfere with the 'right of individuals to live in isolation' (Lord Chancellor's Department, 1997: para. 8.6). Instead the Department of Health and the Welsh Assembly issued the guidance for multi-agency bodies including social services, police and health on adult protection procedures (Department of Health 2000; Social Services Inspectorate Wales 2000). A key difference between the state's reaction to child abuse and elder abuse is the absence of a statutory duty to investigate elder abuse and of a statutory framework for intervention by public authorities (Williams 2008). An additional difference is the low rate of prosecutions for elder abuse. In 2007, there were 2,192 prosecutions in England and Wales for offences relating to child abuse (Hansard 2009). Prosecution is not inevitable following child abuse investigations, but where it happens it punishes offenders and may be a deterrent to others. In the absence of reliable data, anecdotal evidence suggests that prosecutions for elder abuse remain low.

The decision to prosecute rests with the Crown Prosecution Service (CPS) acting under its policy and guidance on prosecuting crimes against older people (CPS 2008a, 2008b). The policy document recognises the importance of prosecutions for elder abuse:

Stopping crimes against older people and bringing perpetrators to justice must therefore be a priority for our society and for the CPS. The CPS recognises its role in protecting older people's human rights by prosecuting offenders effectively. (CPS 2008a: para. 10)

It emphasises the need to recognise the diversity of older people:

Whatever the age of a victim or witness, their needs and case management issues should be assessed on an individual basis. Reliance should not be placed on pre-conceived or stereotypical notions and norms about older people in general. (CPS 2008b: para. 7)

The Code for Crown Prosecutors (CPS 2004) requires prosecutors to apply the Full Code Test, which consists of two stages. Stage 1 is the evidential test: is there enough evidence to provide a 'realistic prospect of conviction'? Here the admissibility and reliability of the evidence is assessed. Will the witness 'stand up at trial'? Although this is difficult to assess, it may be particularly difficult in the case of a vulnerable older person. The assumption may be that an older person will not 'stand up at trial' because of perceived frailty, poor memory or borderline capacity. In addition, ageist assumptions may be made about the robustness of an older person required to provide oral testimony. To overcome such discrimination, Sanders *et al.* in their study of victims with learning disabilities proposed that the test for vulnerable witnesses should be 'would there be a realistic prospect of conviction if one assumes that the witness "stands up"? (Saunders *et al.* 1997: 85).



Once satisfied that the evidential test is met, the CPS considers Stage 2, namely whether a prosecution is needed in the public interest. The factors identified include:

*Prosecution is more likely if:*

- the defendant was in a position of trust;
- the victim was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- there are grounds for believing that the offence is likely to be continued or repeated (e.g. a history of recurring conduct);
- a prosecution would have a significant positive impact on maintaining community confidence.

*Prosecution is less likely if:*

- prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence.

(CPS 2004: para. 5.10)

The only reference to 'elderly' is to the age of the defendant; if the defendant is 'elderly' it is a factor making a prosecution less likely, subject to the seriousness of the offence and the possibility of repetition (para. 5.10). A welfarist response to elder abuse may lead to an assumption that a decision not to prosecute represents the 'public interest' as it avoids exposing victims to the criminal justice system, thus providing a pretext for welfare intervention. 'Well-intentioned ageism' can deny older people the protection of the criminal law and violate their human rights.

The Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) provides for special measures to assist eligible people presenting evidence at a criminal trial where their vulnerability affects the quality of their evidence. Under section 16, YJCEA 1999, a person is eligible for assistance on the grounds of incapacity. 'Incapacity' covers situations where the court concludes that the quality of the evidence 'is likely to be diminished' for one or more specified reasons (section 16, YJCEA 1999). These are that the witness suffers from a mental disorder within the meaning of the Mental Health Act 1983, has a significant impairment of intelligence and social functioning, or has a physical disability or disorder. Older people are more likely to fit into these categories (Breeze *et al.* 2002). Under section 17, YJCEA 1999, a person is eligible for assistance if the court is satisfied that the quality of their evidence is likely to be diminished because of fear or distress on their part. Among the factors to be taken into consideration under section 17 is the age of the witness. The special measures available are

- *screens* – to protect the witness from the defendant;
- *video-recorded evidence-in-chief* – the witness's evidence-in-chief in court;
- *live television link* – witness gives evidence from outside the courtroom;
- *clearing the public gallery of the court*;

- *allowing the witness to use communication aids*;
- *video-recorded pre-trial cross-examination and re-examination* (unlikely to be implemented); and

- *intermediaries* – an approved intermediary to help a witness communicate with legal representatives and the court. Research highlights their potential for reducing stress for child witnesses.

Goodman *et al.* (1998) in their American study examined the effects of using closed-circuit television on the testimony of children and found that open court testimony was associated with children experiencing greater pre-trial anxiety. The Vulnerable Witness Survey found that of the 49 witnesses who used the live video link, all but three found it helpful (Kitchen and Elliott 2001).

However, do special measures violate the defendant's right to a fair trial? Is it 'fair' to depart from established procedures to address witness vulnerability? The criminal justice system is more concerned with the quality of evidence than the impact on a vulnerable older person. Ellison (2003: 10) argues that the 'principle of orality is the foundation of the adversarial trial' as it exposes inconsistency, inaccuracy and fabrication. This appears to have been recognised in *PS v. Germany* (2003), where the alleged victim did not provide evidence; instead, the court heard evidence from her mother and a police officer who interviewed her, and from an expert who commented on her credibility. As the accused did not have the opportunity to cross-examine the person making the allegations, the court found that the defendant's Article 6 right was violated (*PS v. Germany* 2003: paras 23–26). In contrast, the House of Lords in *R (on the application of D) v. Camberwell Green Youth Court*; *R (on the application of the Director of Public Prosecutions) v. Camberwell Green Youth Court* (2005) concluded that special measures do not disadvantage defendants in that evidence is produced in front of the accused, albeit it in pre-recorded form or by live video transmission and the accused can question the witnesses at trial.

Special measures should increase the use of the criminal law and challenge the almost sole reliance on a welfare response to elder abuse. Whether the use of special measures is eventually challenged under the European Convention on Human Rights as undermining the oral nature of criminal proceedings in the United Kingdom remains to be seen. Balancing the interests of the defendant and victim is complex. Arguably, special measures could lead to miscarriages of justice because they are unduly prejudicial to the right to a fair hearing.

Other aids to the greater use of the criminal law centre on the investigative process. The small number of cases of suspected abuse reported to the police identified by the Mowlam study is disturbing. In America 42 states and the District of Columbia have introduced legislation imposing a legal duty on professionals and other individuals to report cases of suspected vulnerable adult abuse (the law in most states concentrates on vulnerable older people). Mandatory reporting may be an option as it would ensure that more cases are thoroughly investigated by the law enforcement agencies. However, it raises the question of whether it would be too intrusive and violate the right



of incapacitated adults to autonomy. For child abuse mandatory reporting is consistent with the welfare principle enshrined in the Children Act 1989. For adults, as indeed for Gillick (1986) AC112 competent children, it risks secondary victimisation (Hanna 1996; Williams 2002).

## Conclusion

As with older prisoners, older victims of stranger crime and the fear of crime, there is a compelling case for greater criminological research into the causes, effects and responses to elder abuse. This is not to argue that every case should be prosecuted or even investigated by the police. The intervention of the police should be proportionate and appropriate. However, the debate on elder abuse needs to be extended beyond the predominately welfare-based one within which it is currently located.

## Selected further reading

The literature on elder abuse from the perspective of a criminologist is not extensive. Brogden and Nijhar (2000) provide an excellent comprehensive account of the way in which the criminal justice system affects the lives of older people and the extent to which they are marginalised by the system. Clearly elder abuse forms a part of the discussion. The most comprehensive review of elder abuse in the United Kingdom is the study by Mowlam *et al.* (2007). For the first time we have clear data on prevalence, forms of abuse and identity of abusers. This has already had a significant impact on the role of the law, including the criminal law, in providing protection for the considerable number of older people who are abused. The limitations of the study are that it does not include older people in institutional settings, nor does it include people with dementia. Ellison (2003) engages in a fascinating debate on the impact of the special measures for vulnerable witnesses giving evidence in criminal trials. Her work reminds us that the use of special measures may compromise other safeguards within the criminal justice system, in particular the right of the accused to a fair hearing. These measures also challenge the oral nature of criminal trials in this country. Comparisons with America are useful as most of the States have in place legislation designed to protect vulnerable adults, in particular older people. Weed (1997) discusses the American experience and identifies many issues relevant to discussion in our jurisdictions. Finally, Williams (2002) considers the case for a new public law allowing intervention in the lives of older people who are being abused.

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